Supreme Court, U.S.
FILED
03-1216 NOV 5 2003
OFFICE OF THE CLERK

CASE NUMBER:

IN THE

SUPREME COURT OF THE UNITED STATES

LAURA B. WITTNER

Petitioner

V.

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY

On Petition For Writ of Certiorari
To The Fifth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

Laura B. Wittner
Pro se
12118 Scottsdale Drive
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QUESTIONS PRESENTED

1. THE CATEGORICAL REJECTION OF DISABILITY CLAIMS IS CONTRARY TO AND INCONSISTENT WITH THE LANGUAGE, INTENT AND SCOPE OF THE SOCIAL SECURITY ACT.

2. THE DECISIONS BELOW CONFLICT WITH DECISIONS FROM THIS COURT, OTHER COURTS OF APPEAL AND THE FIFTH CIRCUIT'S OWN DECISIONS RELATIVE TO SIMILAR DISABILITY CLAIMS UNDER THE SOCIAL SECURITY ACT.

3. THE PROCEDURES AND STANDARDS USED BY THE COMMISSIONER, ADMINISTRATIVE LAW JUDGES AND LOWER COURTS IN DECIDING DISABILITY CLAIMS UNDER THE SOCIAL SECURITY ACT ARE LACKING IN DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE UNITED STATES CONSTITUTION.

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PETITION FOR WRIT OF CERTIORARI

Laura B. Wittner, pro se Petitioner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals Fifth Circuit denying her Social Security benefits for disability.

OPINIONS BELOW

The decisions of the Court of Appeals are unreported. The initial judgment was dated June 12, 2003 and the order denying a rehearing dated August 8, 2003. See Appendix "A".

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

Jurisdiction in the Court of Appeals was based on a de novo review of the District Court judgment and Administrative Law Judge denial of disability benefits under the Social Security Act.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this petition:

28 U.S.C.A. Sec 1254(1), 42 U.S.C.A. Sec 421(k), U.S.C.A. Constitutional Amendments 5, 6 and 14.

STATEMENT OF THE CASE

This is an appeal from the denial of disability benefits under the Social Security Act at the administrative level. On appeal the District Court granted summary judgment affirming the denial. Appeal was taken to the Fifth Circuit Court of Appeals which affirmed the lower court decision. A rehearing was sought and denied. From these actions this petition for a writ of certiorari is brought before this court.

The premise upon which the above rulings were made was that Petitioner did not meet her burden of proof to show a severe impairment during her insured status that prevented her from continuing in her job.

The genesis of this case was in January 1980 when Petitioner was, taken from her place of employment in an unconscious state to a hospital. Subsequently she tried to continue in her job as exchange accounting supervisor and department manager in an oil company. Due to increasing severe health problems she was compelled to leave her employment. She returned briefly for one month at the enticement of her employer only to leave permanently in 1982. She has not worked a day since in any job and is now a total care invalid due to an incapaciting stroke.

Beginning 1980 and extending through the end of her insured status in December 1987 and beyond the Petitioner had the following medical conditions: Continued syncope and near syncope episodes, arrhythmia, high blood pressure, heart palpitations, chest pounding, crushing chest pain, left arm and hand numbness, mitral valve disease, ringing in ears, feeling tired and light headed, shortness of breath, nausea, heart skipping and jumping, bad head aches, pedal edema, finger swelling, resting ECG abnormality, inability to complete stress testing for heart problems due to dizziness, severe spinal pain due to degenerative disk disease, increased difficulty walking and pain in her left surgically repaired knee. The uncontroverted evidence of these conditions exist in the medical records from two hospitals, statements Petitioner and her

husband gave to the Social Security Administration and their respective testimony before the ALJ, who did not find any of such evidence to not be credible. Doctors reviewing the medical records for Commissioner found Petitioner to have palpitations, syncope and arrhythmia. Petitioner also suffered from job stress.

Prior to leaving the work force in 1982 Petitioner was advised by doctors that due to her heart and high blood pressure conditions she should remove herself from stressful situations or these conditions could cause a stroke, heart attack or death.

Petitioner maintained in the lower courts that the uncontroverted and unrebutted medical evidence in the record as a whole constituted substantial evidence of severe impairments, which met or equaled the listings under the Act, and she was therefore entitled to disability benefits. Petitioner had a 20 year work history. It was only after her incapaciting stroke in 1997 did she decide to file for disability. Petitioner's position was that simply because she did not rush and file for disability at the earliest possible time did not mean she did not have the medical impairments she claims now nor should such delay be held against her. The record reveals that it was her intention to try and reenter the work force and even returned to school and took a college course to upgrade her computer skills in 1992 and unsuccessfully sought employment.

Neither the ALJ nor any court reviewing the record on appeal gave any reason for disregarding the plethoric medical evidence before them of severe disability and impairments but simply concluded there was no severe condition. The record as a whole shows substantial evidence of disability and there was no evidence, much less substantial evidence, to support their contentions.

As set out in the filings in the lower courts Petitioner is proceeding pro se not by choice but out of necessity and this issue is discussed later herein.

This case in now five years old and Petitioner has been

without the disability benefits to which she was entitled and such loss is a substantial loss to the prejudice of Petitioner.

It was, and is, Petitioner's position that the policies, practices, procedures and standards applied in processing her claim and appeals and arriving at the decisions made were improperly done.

REASONS FOR GRANTING THE WRIT

THE CATEGORICAL REJECTION OF DISABILITY CLAIMS IS CONTRARY TO AND INCONSISTENT WITH THE LANGUAGE, INTENT AND SCOPE OF THE SOCIAL SECURITY ACT AND DECIDED CASE LAW.

Social Security is a national program whereby enrolled wage earners must pay, under penalty of law, into the system at a uniform rate. Under the Social Security Act, 42 U.S.C.A. Section 421(k) it is mandated that the Act be uniformly applied. Disability determinations must therefore be uniform nation wide.

At the time Petitioner's claim was considered at the administrative level in the Commissioner's Bellaire, Texas office thousands of claimants were having extreme difficulty in obtaining approval of their disability claims. Petitioner's claim was denied at this office.

The Court can take judicial notice of the fact that a series of investigative articles appeared in the Houston Chronicle newspaper in 2001 and 2002 regarding the problems with the claims process in this office and elsewhere in Texas. Copies of some of such articles were presented to the lower courts.

As a result of these articles a bipartisan group of area Congressional leaders convened a public hearing attended by the

Commissioner, who later admitted publicly to problems in the claims process and promised to take corrective action. It was subsequently reported that there had been a dramatic increase in the approval rate of such claims. Allegations were made in these articles that the Administrative Law Judges were biased and prejudiced against disability claimants.

A fair trial or hearing before a fair tribunal is a basic requirement of due process. Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed2d 712 (1975), Valley v. Rapides Parish School Bd., 118 F.3d 1047(5th Cir. 1997).

Wholesale denials of thousands of disability claims in one office is some indication that the decision making process was different from that in the rest of the country.

If the policies, practices, procedures and standards used in determining disability claims is not uniform it violates a claimant's right to due process and equal protection under the law. Procedural due process was discussed in this Court's opinion in Marshall v. Jerrico, Inc., 446 U.S. 238, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

The manner and methods at which the decisions below were reached at all levels were improper. The policies, practices, procedures and standards applied were in violation of the Social Security Act, statutes, decided case law and basic fairness. A policy of nonacquiescence was followed at all levels. These actions caused substantial harm to Petitioner, and other claimants at the time, by resulting in a denial of disability claims and the benefits to which they were entitled. It violated the due process and equal protection rights of such claimants.

There were two standards at work. The one existing prior to the corrective action taken by the Commissioner to curb the abuses in the Bellaire office in deciding disability claims and the one subsequently applied. The Commissioner took no action on or reviewed those claims denied prior to her corrective action. Her action overall resulted in a dual system of disability determination prohibited under the Act.

THE DECISIONS BELOW CONFLICT WITH DECISIONS FROM THIS COURT, OTHER COURTS OF APPEAL AND THE FIFTH CIRCUIT'S ON DECISIONS RELATIVE TO DISABILITY CLAIMS UNDER THE SOCIAL SECURITY ACT.

DISABILITY: Disability was recently defined by the Court in Barnhart v. Walton, 535 U.S. 212, 122 S. Ct.1265, 152 L.Ed2d330 (2002), Walton v. Apfel, 235 F.3d 184 (4th Cir. 2000). Record evidence shows Petitioner to have met this requirement.

SEVERITY REGULATION: This Court has addressed the severity regulation and its application in Bowen v. Yuckert, 482 U.S. 137, 107 S. Ct. 2287, 96 L. Ed. 2d 119 (1987). Accordingly, if the record evidence shows a severe medically determined impairment(s) or combination thereof it is not proper to treat the case as a "de minimis" case. "Severity" must be measured in terms of its effect upon the ability to work and there are standards to be followed in reaching a decision. McCruter v. Bowen, 791 F.2d 1544 (11th Cir. 1986). Cardiovascular problems which can cause stroke, heart attack or death are more than a slight abnormality.

DUTY OF INQUIRY: An ALJ has an obligation to faithfully perform his duty of inquiry. Heckler v. Campbell, 461 U.S.458,103 S.Ct.1952,76 L.Ed2d 66(1983). When a claimant is unrepresented by counsel he has a duty to "scrupulously and conscientiously probe into, inquire of, and explore all the relevant facts." Faerga v. Richardson, 500 F.2d 309 (5th Cir. 1974),cert. denied 420 U.S. 931, 95 S. Ct. 1133, 43 L. Ed.2d 403 (1973), Bowling v. Shalala, 36 F.3d 431 (5th Cir. 1994). This duty of inquiry extends to the District Court. Dixon v. Heckler, 811 F.2d 506 (10th Cir. 1987).

BURDEN OF PROOF AND PRIMA FACIE CASE: Elements of proof are (1) objective medical facts from hospital records, (2) diagnoses and opinions of treating doctors, and (3) claimants subjective evidence of impairments and pain. DePaepe v. Richardson, 464 F.2d 92 (5th Cir. 1972),Owen v. Heckler, 770 F.2d 1276 (5th Cir. 1985).Petitioner met this burden of proof.

CREDIBILITY: Before an ALJ can disregard evidence before him he must make a finding that such evidence is not believable. Scharlow v. Schweiker, 655 F.2d 645 (5th Cir. 1981).

MEDICAL OPINIONS: Before disregarding uncontroverted findings and opinions of treating doctors an ALJ must state good cause for so doing and failure to properly refute such findings and opinions results in them having to be accepted as a matter of law. MacGregor v. Bowen, 786 F.2d 1050 (11th Cir. 1986), Loya v. Heckler, 707 F.2d 211 (5th Cir. 1983), Reddic v. Chater, 157 F.3d 715 (9th Cir. 1998).

RETROSPECTIVE MEDICAL RECORDS: ALJ must properly consider and evaluate retrospective medical evidence as it relates to impairments existing during the insured status. Likes v. Callahan, 112 F3d 189 (5th Cir. 1997).

COMBINATION OF IMPAIRMENTS: ALJ has a duty to make explicit findings related to combined impairments and effect on ability to work. Scott v. Heckler, 770 F.2d 482 (5th Cir. 1985).

LISTINGS FOR DISABILITY: Listings in the Social Security Regulations contain only the most frequently diagnosed impairments and are nor exhaustive. Sullivan v. Zebely, 493 U.S. 521, 110 S. Cr. 885, 107 L.Ed2d 967 (1990).

JOB STRESS: ALJ has a duty to fully develop the record as it relates to a complaint of job stress, the effect it has on ability to work and make findings. Gunnels v. Bowen, 867 F. 2d 1121 (8th Cir. 1989).

In arriving at their respective decisions the ALJ and lower courts disregarded the legal concepts stated in the above cases, employed improper practices and standards in reaching their decisions. Such action is a violation of due process and equal protection-right based upon the manner in which the decisions were made. There was a misapplication of the severity regulation

addressed above and the arbitrary stopping of the evaluation process at step two when there is substantial medical evidence before an ALJ conflicts with the duty of inquiry.

The Court now has an opportunity to resolve any conflicts in the decisions from this Court, other Courts of Appeals and rules and regulations under the Social Security Act and in a clear opinion establish a true national policy to be applied in disability cases.

THE PROCEDURES AND STANDARDS USED BY THE COMMISSIONER, ADMINISTRATIVE LAW JUDGE AND LOWER COURTS IN DECIDING DISABILITY CLAIMS UNDER THE SOCIAL SECURITY ACT ARE LACKING IN DUE PROCESS AND EQUAL PROTECTION GUARANTEED UNDER THE UNITED STATES CONSTITUTION.

A claim for disability benefits triggers due process protection. Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed2d 19 (1976).

Factors to consider relating to due process protection are set forth in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed2d 287 (1970).

Substantial evidence is determined by reviewing the whole record. Universal Camera Corp. v. National L.R. Bd., 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456 (1951).

Due process requires that a social security hearing be "full and fair." Richardson v. Perales, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed2d 842(1971).

A claimant has a property right and interest in a disability claim. Flatford v. Chater, 93 F.3d 1296 (6th Cir. 1996). It follows therefore that such a claim gives rise to a colorable constitutional claim.

Petitioner believes that the principles set forth in the above decisions were breached in the processing of her claim in that the policies, practices, procedures and standards applied at the administrative and appeals level in deciding her disability claim were improper, outside of the established case law and governing statutes and constituted a violation of her due process and equal protection rights. She had timely raised these constitutional questions in the lower courts.

In addition to the administrative difficulties in the claims process it is equally difficult to obtain a denial reversal in the Southern District of Texas or Fifth Circuit. Record of these courts are the best evidence of this fact. Due to these difficulties Petitioner was unable, even with a lawyer husband, to engage competent counsel to represent her in this matter and this inability to obtain counsel was not due to a lack of merit of her claim but the external factors stated. The statutory right to counsel under the Act means nothing if a legal environment is created into which no competent counsel desires to work.

The Supreme Court has not recognized a constitutional right to counsel in a civil matter before an administrative agency. Lower court authority states no such right exist. Holland v. Heckler, 764 F.2d 1560 (11th Cir. 1985). Petitioner challenges that holding and maintains she has a right to counsel under the Fifth, Sixth, and Fourteenth Amendments as do any other claimant for disability. If the "state" action is such as to infringe on that right it is unconstitutional as was the case in this instance. Due to the difficulties discussed regarding obtaining counsel it is true Petitioner waived her right at the hearing. Based on the facts what occurred was a form of compulsion or coercion to proceed or not have her claim considered. We now know from the record that this substantially prejudiced Petitioner, and other claimants, who lost their right to disability benefits. The ALJ did not discuss in detail, as required, matters related to proceeding without counsel as the opinion indicates he did.

CONCLUSION

This writ for certiorari should be granted so that this Court can set out once and for all the appropriate standard to be applied in deciding social security cases. This is of national importance with an aging population and more disabled citizens coming on line for disability.

No further pleadings or briefs are necessary as the case was well briefed by both sides below. Disposition therefore can be had under Supreme Court Rule 16 and is hereby requested.

All parties entitled to notice of the filing of this writ have been notified and evidenced by the separate filing of Proof of Service.

Respectfully submitted,
Laura B. Wittner, Pro se
12118 Scottsdale Drive
Stafford, Texas 77477
(281) 879-0459

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 12, 2003
Charles R. Fulbruge III
Clerk

No. 02-21315
Summary Calendar

LAURA B. WITTNER,

Plaintiff-Appellant,

versus

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(H-01-CV-2746)

Before DAVIS, WIENER, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:*

Plaintiff-Appellant Laura B. Wittner, pro se, appeals the district court's judgment that affirmed the decision of the Commissioner of Social Security ("Commissioner") denying disability benefits. In her unusually able pro se brief, Wittner contends on appeal that the record evidence does not support the decision of the Administrative Law Judge ("ALJ"). Wittner asserts that the hearing testimony and medical records establish that she is disabled, arguing that hypertension and pain are sufficiently disabling conditions and that she meets the listing for hypertension.

Our review is limited to determining whether the Commissioner applied the proper legal standards and whether the decision is supported by substantial evidence on the record as a whole. Anthony v. Sullivan, 954 F.2d 289, 292 (5th Cir. 1992). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Villa v. Sullivan, 895 F.2d 1019, 1021-22 (5th Cir. 1990). We may not reweigh the evidence or try the issues de novo. Id. at 1022.

**Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.*

Wittner bears the burden of proving her disability by establishing an impairment. See Wren v. Sullivan, 925 F.2d 123, 128 (5th Cir. 1991). Subjective complaints require corroboration by objective medical evidence. Houston v. Sullivan, 895 F.2d 1012, 1016 (5th Cir. 1989) . The disabling nature of pain is an issue for the ALJ to decide, and the ALJ's determination is entitled to considerable deference. Chambliss v. Massanari, 269 F.3d 520, 522 (5th Cir. 2001).

The instant record is devoid of evidence that Wittner suffered from a disabling condition during the period of her insured status. See 42 U. S C. § 423 (d) (1) (A) . Wittner does not establish that she satisfied the requirements for a listed impairment, and the record contains no evidence that Wittner met the listing for hypertension.

See 20 C.F.R. 404, Subpt. P, App. 1, § 4.OOA, § 4.OOE2. The ALJ applied the proper legal standards, and the Commissioner's decision is supported by substantial evidence. Anthony, 954 F.2d at 292.

The ALJ concluded that Wittner was not disabled at Step Two of the analysis. This conclusion terminated the analysis, and the ALJ was not required to evaluate Wittner's ability to work. Muse v. Sullivan, 925 F.2d 785, 789 (5th Cir. 1991) ; Crouchet v. Sullivan, 885 F.2d 202, 204, 206 (5th Cir. 1989).

Undeterred, Wittner contends that the ALJ demonstrated a predisposition to rule against her, stating before the hearing was complete that he would find it difficult to rule in her favor. Wittner insists that the ALJ violated her right to due process and held her to an improper standard by requiring additional record evidence. She also asserts that she was denied the right to counsel. These contentions are belied by the record.

The record shows that the ALJ explained the burden of proof that, as the claimant, Wittner was required to bear if she was to show entitlement to disability benefits. Wittner failed to produce objective medical evidence for the period during which she was insured, as required to substantiate her disability claims. Wittner was sufficiently informed of her right to an attorney, after which she validly consented to proceed without representation. See Castillo v. Barnhart, 325 F.3d 550, 552 (5th Cir. 2003). Furthermore, Wittner has failed to identify any evidence that an attorney might have adduced that would have been sufficient to change the result. See id.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-21315

U. S. COURT OF APPEALS
FILED
AUG 0 8 2003
CHARLES R. FULBRUGE III
CLERK

LAURA B WITTNER
Plaintiff - Appellant

V.

JO ANNE B BARNHART,
COMMISSIONER OF SOCIAL SECURITY
Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING

Before DAVIS, WIENER, and EMILIO M. GARZA, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

United States Circuit Judge

REHG-2

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE

APPENDIX B

28 § 1254. courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(June 25, 1948, c. 646, 62 Stat. 928; June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

APPENDIX C

(k) Establishment of uniform standards for determination of disability

(1) The Commissioner of Social Security shall establish by regulation uniform standards which shall be applied at all levels of determination, review, and adjudication in determining whether individuals are under disabilities as defined in section 416(i) or 423(d) of this title.

APPENDIX D

AMENDMENT V-GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT XIV-CITIZENSHIP; PRIVILEGES AMD IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Citizenship and Privileges and Immunities Clauses of Section 1 are set out in this volume. See the following three volumes for materials pertaining to the Due Process and Equal Protection Clauses of that section and Sections 2 to 5.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim

for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix E

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED
S E P 1 8 2002
Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAURA B. WITTNER,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. H-O1-2746
	§	
JO ANNE B. BARNHART,	§	
Commissioner of the Social	§	
Security Administration,[1]	§	
	§	
Defendant.	§	

MEMORANDUM & ORDER

Pending before the Court is the Motion of the Defendant, Jo Anne B. Barnhart in her capacity as Commissioner of the Social Security Administration (the "Commissioner"), for Summary Judgment (Dkts. # 9, 11). The Court has considered the motions, all relevant findings, the administrative record, and the applicable law.[2] For the following reasons, the Court GRANTS summary judgment in favor of the Commissioner.

Background

The Plaintiff, Laura B. Wittner ("Wittner"), filed this action pursuant to 42 U.S.C. § 405(g) and § 1383(c)(3) for judicial review of the Commissioner's unfavorable decision. Her claim for disability insurance benefits is founded on Title II of the Social Security Act ("the Act").

[1]Jo Anne B. Barnhart was appointed Commissioner of the Social Security Administration on November 14, 2001. Pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Barnhart is hereby substituted in place of the original defendant, Larry G. Massanari. Under the Social Security Act, no further action is necessary to continue this suit. See 42 U.S.C. § 405(g).

[2]As the Court has drafted its own Memorandum and Order, the plaintiffs motion to strike the defendant's proposed order (Dkt. # 13) is DENIED as moot.

Wittner was fifty-six years old on the date of the hearing before the Administrative Law Judge of the Social Security Administration ("ALJ").[3] She possessed an 11th grade education and attended college courses to upgrade her computer skills[4] Wittner's past relevant work included work as a scheduler for an oil company.[5] She filed for disability on November 30, 1998, claiming an inability to work as of March 1, 1982.[6] She claimed that her inability to work is due to a stroke, heart valve problems, diabetes, spinal arthritis, weakness, fainting, and elevated blood pressure due to stress.[7] After Wittner's applications were denied at the initial and reconsideration levels, she requested a hearing before the ALJ.[8]

Wittner and her husband, Van E. Wittner, testified during the hearing on December 15,1999.[9] Wittner testified that she began to suffer adverse physical symptoms after she suffered a "stroke" on January 3, 1980.[10] She was hospitalized for heart palpitations from January 3 to January 6, 1980, which was followed by chest pain, left arm numbness, nausea, and loss of consciousness.[11] An echocardiogram, 24-Holter monitor, and glucose tolerance test were each normal. [12] During Wittner's

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[3]Transcript of the Administrative Proceedings ("Tr."), Dkt. # 4,at 17, 34.

[4]Tr.at 11, 87.

[5]Tr.at11.

[6] Tr. at 53.

[7] Tr. at 10, 12, 86-87.

[8] Tr. at 34-45, 46.

[9] Tr. at 19-33.

[10] Tr. at 23, 12.

[11] Tr. at 101-03.

[12] *Id*

brief hospital stay, she remained asymptomatic and was discharged without any medications. [13] Her final diagnosis was heart palpitations and syncope of undetermined origin.[14]

Wittner reported that she continued to experience episodes of weakness and faintness from 1980 until 1982, and she took aspirin to relieve these symptoms.[15] She also claimed to have been treated by John McHenry, M.D., ("Dr. McHenry") in 1982 for her high blood pressure and back problems, and he allegedly prescribed Parafon Forte to alleviate Wittner's impairments.[16] However, the medical records evidencing her visits to Dr. McHenry are unavailable, and Dr. McHenry does not recall Wittner's visits.[17] As evidence of her high blood pressure, Wittner testified that she was not allowed to donate blood at work-sponsored blood drives because of her high blood pressure.[18]

Wittner testified that she resigned from her job in March of 1982 because of the high levels of stress.[19] She claimed that the stress of work caused her blood pressure to elevate, which would lead to heart problems.[20] After her resignation, Wittner asserted that her blood pressure decreased

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[13] Id

[14] Tr. at 101.

[15] Tr. at 12, 86-87.

[16] Tr. at 12, 82.

[17] Tr. at 12, 28. Dr. McHenry's office destroyed all medical files that were inactive for ten years or more due to lack of space, which included Wittner's medical records. *See* Tr. at 91-92.

[18] Tr. at 25. The ALJ dismissed this evidence because blood drives usually do not result in documentation that would survive until the present, and Wittner did not produce such evidence. *Id.*

[19] Tr. at 22.

[20] Tr. at 22-23.

and returned to normal.[21] However, Wittner could not produce any medical evidence proving the decrease in her blood pressure.[22] Furthermore, there is a total lack of medical records from March 1982, the date she was last employed, to December 31, 1987, the date her insured status expired.[23]

Van Wittner also testified as to Laura Wittner's physical condition. He claimed that she suffered from instances of weakness and dizziness subsequent to her stroke in 1980 and had to quit her job in March of 1982 due to high blood pressure.[24] Van Wittner also alleged that his wife's blood pressure improved and her heart valve problems subsided after she resigned from her job.[25]

After hearing the testimony and reviewing the medical record, the ALJ determined that Wittner was not disabled under the Act because she did not provide any objective evidence to establish the existence of a "severe" medically determinable impairment prior to December 31, 1987.[26] The Appeals Council approved the ALJ's decision, thereby transforming it into the final decision of the Commissioner.[27] Wittner then timely sought judicial review of the decision by this Court.

Standard of Review and Applicable Law

The Court's review of the Commissioner's final decision to deny disability benefits is limited

[21] Tr. at 23.

[22] Tr. at 24.

[23] Tr. at 27.

[24] Tr. at 20-22. Van Wittner gave an example of Laura Wittner's faintness and dizziness when he testified that she passed out in a restaurant one evening, and she was given aspirin to alleviate these symptoms. *Id.*

[25] Tr. at 32, 29.

[26] Tr. at 12.

[27] Tr. at 3-4.

to two issues: 1) whether substantial record evidence supports the decision; and 2) whether proper legal standards were used to evaluate the evidence. *See Waters v. Barnhart, 276* F.3d 716, 718 (5th Cir. *2002)* (citing *Estate of Morris v. Shalala,* 207 F.3d 744, 745 (5th Cir. *2000)); Brown v. Apfel,* 192 F.3d 492, 496 (5th Cir. 1999) (quoting *McQueen v. Apfel,* 168 F.3d 152, 157 n. 2 (5th Cir. 1999))

To claim entitlement to disability benefits, a claimant must show that she was disabled on or before the last day of her insured status. *Demandre v. Califano,* 591 F.2d 1088 (5th Cir. 1979). The legal standard for determining disability under the Act is whether the claimant is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment

which ... has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). To determine whether a claimant is capable of performing any "substantially gainful activity," the regulations provide that the Commissioner should evaluate disability claims according to the following sequential five-step process:

(1) a claimant who is working, engaging in a substantially gainful activity, will not be found to be disabled no matter what the medical findings are;

(2) a claimant will not be found to be disabled unless he has a "severe impairment;"

(3) a claimant whose impairment meets or is equivalent to an impairment listed in [the Listings] will be considered disabled without the need to consider vocational factors;

(4) a claimant who is capable of performing work he has done in the past must be found "not disabled;" and

(5) if the claimant is unable to perform his previous work as a result of his impairment, then factors such as age, education, past work experience, and residual functioning capacity [("RFC")] must be considered to determine whether he can do other work.

Bowling v. Shalala, 36 F.3d *431, 435* (5th Cir. 1994).

To be entitled to benefits, a claimant bears the burden of proving that she is unable to engage in substantial gainful activity within the meaning of the Act. *See Wren v. Sullivan, 925* F.2d *123, 125* (5th Cir. 1991) (citing *Cook v. Heckler, 750* F.2d *391, 393* (5th Cir. 1985)). By judicial practice, this translates into the claimant bearing the burden of proof on the first four of the above steps and the Commissioner bearing it on the fifth. *See Brown,* 192 F.3d at *498; Greenspan v. Shalala, 38* F.3d *232, 236* (5th Cir. *1994)* (citing *Bowen v. Yuckert, 482 U.S. 137, 146* n. 5 (1987)). The analysis stops at any point in the five step process upon a finding that the claimant is or is not disabled. *See Greenspan, 38* F.3d at *236.*

Discussion

In this case, the ALJ determined that Wittner was not entitled to a period of disability or disability insurance benefits under the Act." The ALJ based his decision on a failure by Wittner to provide substantial objective evidence of disability prior to December 31, 1987, the date on which her insured status expired. Consequently, the ALJ concluded, Winner was unable to demonstrate that, since the alleged onset of her disability and prior to the expiration of her insured status, she was unable to engage in substantial gainful activity.[30] Although the ALJ found that Wittner has not worked or engaged in substantial gainful activity since 1982, the ALJ concluded that Wittner was unable to show that during the period from January 1980 to December 1987 she suffered from a

[28] Tr. at 13.

[29] Tr. at 12.

[30] Tr. at 13

"severe medically determinable impairment," which significantly limited her ability to perform work.[31] Thus, Wittner's claim failed at Step Two of the sequential evaluation process. Specifically, the ALJ noted that "for the period prior to the claimant's date last insured, December 31, 1987, there is a paucity of medical evidence."[32]

In his evaluation of the evidence, the ALJ found that Wittner did provide medical evidence in the form of hospital records showing that she suffered a debilitating stroke in January 1997.[33] However, the stroke did not occur prior to the expiration of Wittner's insured status. As the ALJ noted, the claimant must establish that she was disabled on or before the last day of her insured status. *See Demandre, 591* F.2d at 1090. Additionally, Wittner was able to present evidence of her hospitalization in January 1980, but she could not show that her discharge diagnosis evidenced anything more than "a slight abnormality having such minimal effect on [her] that it would not be expected to interfere with the ability to work."[34] The ALJ noted that Wittner provided her own testimony and

the testimony of her husband to show that from 1980 until 1982 Wittner continued to suffer from weakness and fainting. [35] That testimony is the sole evidence that Wittner sought treatment from John McHenry, M. D. in 1982 for her high blood pressure and back pain, and that Dr. McHenry prescribed her Parafan Forte for those impairments. The ALJ noted the unfortunate

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[31] Tr. at 12.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

unavailability of Dr. McHenry's medical records.[36]

Finally, the ALJ acknowledged Wittner's testimony that she left her job in March 1982 due to job stress causing her high blood pressure and that her blood pressure dropped after that date.[37] The ALJ found Wittner's testimony and the testimony of her husband to be credible.[38] The ALJ correctly pointed out, however, that Wittner provided no medical records to document her assertions and corroborate her testimony. [39] The ALJ found that the subjective statements regarding Wittner's medical condition from 1980 until 1987 were not sufficient evidence to meet the burden of proving the existence of a severe impairment.[40] The ALJ remarked that, aside from one substantiated episode of heart palpitations suffered by Wittner, the record is void of sufficient evidence to corroborate even credible testimony of impairment. [41]

In her Original Complaint, Wittner requests review of the ALJ's decision on the basis that "there is no substantial evidence in the record to support the decisions of the Administrative Law Judge or Appeals

Council."[42] Wittner additionally filed an Amended Complaint,[43] which reasserts her claim that she is entitled to disability benefits and also alleges several violations of her Constitutional rights. This Court finds that the Amended Complaint was improperly filed without

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Dkt. #1, ¶ VI.

[43] Dkt. #12.

prior request for leave to file.[44] This error justifies striking the Amended Complaint. However, the Court has given the Amended Complaint a cursory review and has determined that Wittner's allegations of Constitutional violations are without merit. Moreover, the Amended Complaint provides no additional evidentiary support to Wittner's claim that was not already included in Plaintiff's Response to Defendant's Motion for Summary Judgment.

In support of her request for review of the ALJ's decision, Wittner argues "that there was a lack of substantial evidence of record to support the Commissioner's decision and that the decision does not comport with relevant legal standards because there was credible evidence to support Plaintiff's disability claim.[45] Wittner claims that in her hearing before the ALJ, she presented sufficient objective and subjective evidence of her medical condition to

establish entitlement to disability benefits. The Commissioner asserts that the ALJ correctly determined that Wittner did not suffer from a severe impairment prior to the date on which she was last insured for disability benefits, and that, consequently, she is not entitled to disability benefits. The Court agrees.

In order for a claimant to be deemed disabled, she must demonstrate that she suffered from a severe impairment prior to the date on which her insured status expired. *See Demandre, 591* F.2d at 1090. As the ALJ noted, a medically determinable impairment is severe if it significantly limits an individual's ability to do basic work activities. 20 C.F.R. § 404.1521. The impairment must result from abnormalities which can be shown by "medically acceptable clinical and laboratory

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[44] Under FED. R. Civ. P. 15(a), once more than 20 days have passed after an original pleading has been filed, or after a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party." In this case, Wittner filed her original complaint on August 14, 2001. The Commissioner filed an answer on November 9, 2001. Wittner filed her amended complaint on February 15, 2002, 14 days after she filed her response to the Commissioner's motion for summary judgment.

[45] Dkt. #10, ¶ 3.

diagnostic techniques." 20 C.F.R. § 404.1508. This standard was properly applied by the ALJ. Wittner contends that her testimony, and the testimony of her husband, as to her medical condition between 1980 and 1987 establishes her severe impairment, so as to meet her burden of proof. However, this Court finds that Wittner failed to prove that she suffered from a severe impairment. The ALJ was correct in determining that the lack of objective medical evidence in this case dictates a finding that Wittner did not suffer from a severe impairment prior to 1987. Even if, as the ALJ concluded, Wittner's testimony and the testimony of her husband were credible, such subjective statements are insufficient to meet the burden of proof. The

Fifth Circuit case law makes clear that a claimant's subjective testimony about her condition must be corroborated by objective medical evidence. *See Wren,* 925 F.2d at 128-29. Wittner was able to provide only scarce medical records documenting her condition from 1980 until 1987, primarily her patient record from a three-day stay at Methodist Hospital in January 1980. Indeed, the record is devoid of any documentation of Wittner's medical history from her discharge from the hospital in 1980 until her stroke in 1997. Because Wittner has not supported her testimony with sufficient medical evidence, she has not met her burden of proof on the severe impairment question, Step 2 of the sequential process..

Wittner insists that the ALJ placed an improper burden on her to produce medical records reflecting her alleged disability. This Court finds that the ALJ properly placed the burden on Wittner to prove that she suffered from a severe medical impairment. *See Brown,* 192 F.3d at 498. As discussed previously, such an impairment cannot be established solely by a plaintiffs subjective opinions about her condition, but must be corroborated by objective medical evidence. *See Wren,* 925 F.2d at 128-29. Thus, it was proper for the ALJ to demand that Wittner produce additional objective evidence of her condition in the form of medical records.

Wittner also contends that because her alleged disability began before the end of her insured status and continued beyond the date the insured status ended, she is entitled to disability benefits. Wittner argues that her "continuous and unbroken history of hypertension, severe pain in her left knee and back and mitral valve problems" establish an ongoing disability, which entitles her to benefits. [46] That Wittner claims she has suffered continuously from 1980 until the present does not avoid the evidentiary problem she faces. She is still unable to provide sufficient medical evidence of a severe impairment which occurred prior to 1987. Any evidence of an impairment Wittner suffered after 1987 is irrelevant to this inquiry. It appears to the Court that Wittner is attempting to use the medical evidence of her stroke in 1997 to establish a severe impairment before 1987. While both the ALJ and this Court acknowledge that Wittner's medical evidence shows that Wittner suffered a stroke in January 1997, such

evidence cannot counterbalance the obvious lack of medical evidence of any disability during the period from 1980 to 1987.

Because Wittner was unable to establish that she suffered from a severe impairment prior to the expiration of her insured status, the disability inquiry ends. Accordingly, this Court upholds the Commissioner's denial of disability benefits on the basis that the decision is supported by evidence in the record and based upon the application of proper legal standards to that evidence.

Conclusion

For the foregoing reasons, the Commissioner's Motion for Summary Judgment is GRANTED. The Court will issue a final judgment on even date herewith.

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[46] Dkt. #10, ¶ 5.

Signed this 17 day of September /S/ John D. Rainey 2002.

JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURTS
SOUTHERN DISTRICT OF
TEXAS
ENTERED
S E P 1 8 2002
Michael N. Milby, Clerk of Court

UNITED STATES DISTRICT COURTS
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LAURA B. WITTNER,	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-01-2746
JO ANNE B. BARNHART,	§	
Commissioner of the Social	§	
Security Administration,	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the Court's Memorandum and Order signed this date, the Court now believes that final judgment should be entered. Therefore it is ORDERED that the decision of the Commissioner of the Social Security Administration is AFFIRMED in all respects.

This is a FINAL JUDGMENT.

Signed this 17 day of September, 2002.

/S/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE

UNITED STATES COURTS
SOUTHERN DISTRICT OF TEXAS
ENTERED
OCT 21 2002
Michael N. Milby, Clerk of Court

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Security Administration,	§	
Defendant.	§	

ORDER

Pending before the Court is Plaintiff, Laura B. Wittner's, Motion for Reconsideration (Dkt. #16). Plaintiff asks the Court to reconsider its order and final judgment entered September 17, 2002, granting Defendant's motion for summary judgment. Having reviewed Plaintiffs arguments, this Court is of the opinion that Plaintiff has presented no new evidence that would cause the Court to reconsider its decision. Accordingly, Plaintiffs motion is DENIED.

Signed this 20 th day of October, 2002.

/S/ John D. Rainey
JOHN D. RAINEY
UNITED STATES DISTRICT JUDGE